STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2005
v	No. 252364 Macomb Circuit Court
WILLIAM PATRICK SOLOMON, Defendant-Appellant.	LC No. 2003-001841-FC

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b). Defendant was sentenced to concurrent prison terms of twelve to thirty years for each conviction of first-degree criminal sexual conduct and four to fifteen years for his conviction of second-degree criminal sexual conduct. Defendant appeals as of right. We affirm.

Defendant first argues that, because there was no evidence that defendant fled or otherwise hid from the police after being accused of the instant offenses, the trial court erred in instructing the jury on flight. We disagree. This Court reviews de novo alleged errors in the instruction of a jury. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

Defendant is correct that, "[t]o give a particular instruction to a jury, it is necessary that there be evidence to support the giving of that instruction." *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). The instruction at issue here was based on CJI2d 4.4, and was given as follows:

> There has been some evidence that the defendant ran away or hid after he was accused of the crime. This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, fear or lack of knowledge. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true. And if true, whether it shows that the defendant had a guilty state of mind.

We find this instruction to have been adequately supported by the evidence at trial. During the course of proofs it was shown that defendant voluntarily spoke with the police and, in

doing so, learned for the first time that his minor stepdaughter had informed the police of sexual contact between herself and defendant. Shortly thereafter, a warrant was obtained for defendant's arrest. The police, however, were unable to locate defendant despite their efforts to contact him at both his longtime place of work and another possible work location. For purposes of executing the warrant, the police also called a number of defendant's friends to inquire whether they knew of his whereabouts, and even contacted law enforcement agencies in other jurisdictions for help in locating defendant. However, these efforts to locate defendant, who appeared in court of his own accord several months later, were unsuccessful.

On the basis of this evidence, we find no error in the challenged instruction. Although the evidence did not show where defendant had gone or whether he knew with certainty that he was being sought by the police, there was sufficient evidence of flight to support the instruction given by the trial court. *Johnson*, *supra*. Moreover, the challenged instruction left it to the jurors to decide whether defendant fled, and if so, whether he had done so because of a guilty conscience or perhaps because he did not know he was being sought. By doing so, the instruction "fairly presented the issues to be tried and sufficiently protected . . . defendant's rights." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Accordingly, defendant is entitled to no relief on this claim of instructional error.

Defendant also argues that he was denied a fair trial by several instances of prosecutorial misconduct. Again, we disagree.

We review de novo a preserved claim of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting a defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003); *Thomas*, *supra* at 453-454. In either case, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

In his only preserved claim of prosecutorial misconduct, defendant argues that the prosecutor improperly shifted the burden of proof when, in response to defense counsel's comments concerning the prosecution's failure to produce telephone records to support testimony concerning numerous telephone calls between defendant and the victim, the prosecutor made the following comments during his rebuttal closing argument:

> He's saying I'm not putting evidence in because I don't have it. The phone calls are uncontroverted. He admits there's a bunch of phone calls in the interview with the detective. She says there's a bunch of phone calls. The mother testifies she found a bunch of phone calls on the phone records. It's uncontroverted evidence. He didn't ask to see the phone bills from her, did he?

Although defendant is correct that a prosecutor generally may not comment on a defendant's failure to present evidence, see *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), prosecutorial remarks, even if improper, do not require reversal if they address issues raised by defense counsel. *Callon*, *supra* at 330. As noted above, the comments at issue here were responsive to defense counsel's argument concerning the significance of the telephone records. Taken in context, the prosecutor's comments did not shift the burdens of

proof or production to defendant. Accordingly, we do not believe that defendant was denied a fair trial as a result of the challenged remarks. *Thomas*, *supra*.

Defendant also argues that the prosecutor's rebuttal closing was improper because the prosecutor commented on defendant's failure to ask for the production of the victim's diary or medical records. These alleged errors were not preserved by objection below. Like the prosecutor's commentary regarding the telephone records, the prosecutor's comments regarding the diary and medical records were made in response to defense counsel's argument that the prosecution's failure to produce these documents was somehow relevant. As explained above, such responsive remarks do not deprive a defendant of a fair trial. *Callon*, *supra*. Consequently, defendant has failed to establish plain error warranting relief. *Id*. at 329.

Defendant also asserts that the prosecutor committed misconduct when he stated during closing argument that he could not imagine that the victim would find it enjoyable to testify to the sexual contacts she had with defendant, and noted that her allegations never wavered after she initially spoke with the police. In context, it is clear that the prosecutor was simply and permissibly arguing that the victim was worthy of belief, despite any minor discrepancies in her story. *Thomas*, *supra* at 455.

Defendant also challenges the prosecutor's remarks concerning the fact that the victim's father had her committed to a hospital for psychiatric treatment. Defendant argues that these remarks were improper because no expert evidence was presented that the treatment she received was connected to the crimes charged. We do not agree. Throughout the trial, defendant argued that the charges against him were a fabrication. The prosecutor was merely responding to this line of argument when he commented that it must have been an elaborate ruse if it involved committing the complainant for psychiatric treatment. *Callon*, *supra* at 330. In other words, the prosecutor took facts in evidence, and the reasonable inference arising therefrom, and permissibly argued that the complainant's testimony was worthy of belief. *Id*.; *Thomas*, *supra*.

Defendant also argues that the prosecutor misled the jury when he stated during his closing argument that the sexual contact between defendant and the victim ended by the beginning of May 2002. This comment was made in the context of explaining why defendant did not object to undergoing a DNA analysis when the police falsely informed him in October 2002 that the victim was four months pregnant. The prosecutor argued that because the sexual relations ended by the beginning of May, defendant knew that he could not be the father and thus had no objection to the test. The evidence adduced at trial was ambiguous on when the sexual contact ended. There was evidence that the victim had told the police that the contact ended around the end of April 2002. However, during direct examination, the victim began to discuss a sexual encounter that took place after she had moved in with her father, which was in mid-June 2002. The prosecutor cut her off and redirected her testimony to the charged incidents, which occurred from January to May 2002. The nature of the briefly referenced June 2002 contact is not discernable from the record.

Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *Callon*, *supra*, we find that a timely objection would have hindered any prejudice and alerted the jury to the potential inconsistency in the prosecutor's reasoning. Moreover, in light of the weight of the evidence presented we do not believe that any possible mischaracterization by the prosecutor "resulted in the conviction of an actually innocent

defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 329.

We also reject defendant's assertion that he was denied a fair trial by the cumulative effect of the alleged instances of prosecutorial misconduct. "'[O]nly actual errors are aggregated to determine their cumulative effect.'" *People v Rice* (*On Remand*), 235 Mich App 429, 448; 597 NW2d 843 (1999), quoting *Bahoda, supra* at 292 n 64. Of the errors alleged on appeal, only the prosecutor's comment regarding when the sexual contact ended was actual error. As noted, this single error does not warrant reversal of defendant's convictions.

Last, defendant argues that he should be resentenced because the procedure by which he was sentenced was ruled unconstitutional in *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court opined that the holding of *Blakely* does not affect Michigan's indeterminate sentencing scheme.[1] Accordingly, defendant's argument for resentencing fails.

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

[1] This conclusion is unaffected by *United States v Booker*, __ US __; 125 S Ct 738; 160 L Ed 2d 621 (2005), because "there is no distinction of constitutional significance" between the sentencing schemes at issue in *Booker* and *Blakely*. *Id*. at 749.